

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/06**

Date: **6 March 2013**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public Document

Prosecution's request to strike Thomas Lubanga's Reply or, alternatively, for leave to respond to its new argument

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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REGISTRY

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Procedural History

1. On 14 March 2012, the Trial Chamber convicted Thomas Lubanga of three counts of war crimes.¹ On 10 July 2012, the Trial Chamber rendered its “Decision on Sentence pursuant to article 76 of the Statute” in which the Majority imposed a joint sentence of 14 years imprisonment.² Both parties filed notices of appeal.³
2. On 26 November 2012, the Appellant submitted a request to present additional evidence for the first time on appeal.⁴
3. On 3 December 2012, the Appellant filed documents in support of both his appeal against the Sentencing Decision⁵ and his appeal against the article 74 Judgment.⁶
4. On 4 February 2013, the Prosecution filed its response to the Appellant’s appeals against conviction⁷ and sentence⁸, in which it addressed his proffered new evidence.
5. On 15 February 2013, the Appellant requested permission to file a reply to the Prosecution’s responses to his appeals against conviction and sentence, under regulation 60 of the Regulations of the Court.⁹ On 21 February, the Appeals Chamber granted Thomas Lubanga’s request to file a consolidated reply to the Prosecution’s responses to his documents in support of both appeals, of no more than 20 pages.¹⁰
6. On 28 February 2013, Thomas Lubanga filed his reply.¹¹

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ ICC-01/04-01/06-2933 OA4; ICC-01/04-01/06-2934 OA5; ICC-01/04-01/06-2935 OA6.

⁴ ICC-01/04-01/06-2942-Conf.

⁵ Sentencing Appeal Brief.

⁶ ICC-01/04-01/06-2948-Conf.

⁷ ICC-01/04-01/06-2969-Conf.

⁸ ICC-01/04-01/06-2968-Conf.

⁹ ICC-01/04-01/06-2979.

¹⁰ ICC-01/04-01/06-2982.

¹¹ ICC-01/04-01/06-2989-Conf and ICC-01/04-01/06-2989-Red.

Prosecution's Observations

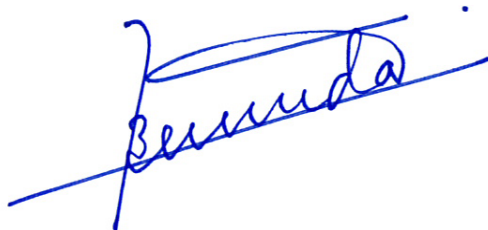
7. The Appeals Chamber granted Thomas Lubanga permission to file a consolidated reply that "must not exceed 20 pages".¹² Thomas Lubanga's reply is 22 pages. Under the applicable Appeals Chamber jurisprudence, when a page limit is set for 20 pages that page limit cannot be exceeded without prior authorization.¹³ Accordingly, the Prosecution requests that the Chamber disallow the reply and require the appellant to file a brief that complies with the authorized page limits.
8. Additionally, the reply contains a new factual argument that was hitherto not raised in Thomas Lubanga's appeal documents *and* that contains serious accusations against the Prosecution. In paragraphs 11-13 of the reply, Thomas Lubanga alleges deliberate non-disclosure of other document(s) and another circumstance that the Appellant did not previously cite in its earlier documents. Although the new argument is introduced under the guise of a reply to a point made by the Prosecution, it goes beyond the scope of proper reply and also mischaracterizes the record on a matter which the Prosecution has not had the chance to address.
9. When the Appeals Chamber considers it necessary that a reply be filed under regulation 60 of the Regulations of the Court, such reply should limit itself to arguments in reply to the respondent's brief. It should not include fresh arguments. The ICTY Appeals Chamber has noted that the purpose of this limitation is to "prevent an appellant from raising new arguments in a brief in reply as the respondent would not have an opportunity to respond to such new arguments".¹⁴ Indeed, the orderly process of appellate practice would require that the appellant make his arguments in his opening brief and not resort to progressive briefing so as to trigger the need for continuing responses.

¹² ICC-01/04-01/06-2980, para.8.

¹³ ICC-02/11-01/11-266 RH PT OA2; ICC-01/04-01/06-2543 OA18, para. 11.

¹⁴ *Prosecutor v. Stanislav Galic*, Case, No.IT-98-29-A, Decision On Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005.

10. The presentation of a new claim for the first time in a reply brief creates unfairness to the Prosecution and deprives the Appeals Chamber of responsive arguments that can assist the Chamber for the proper determination of the issue. Accordingly, the Prosecution requests that the Chamber (a) allow the Prosecution to file a brief document, addressing the new factual allegation, which the Chamber can do by virtue of the general authority enshrined in regulation 28 of the Regulations of the Court;¹⁵ or (b) strike the supplementary factual allegations in question.



Fatou Bensouda
Prosecutor

Dated this 6th day of March 2013
At The Hague, The Netherlands

¹⁵ The Prosecution notes that it was authorized to file a response to Mr Lubanga's appeal against sentence (which is the document that gave rise to the present issue) not exceeding 125 pages and in fact used only 40 pages.